Avery Leasing, Inc. *and* Local 7, International Brotherhood of Teamsters, AFL–CIO. Case 7–CA–35409

November 14, 1994

DECISION AND ORDER

BY CHAIRMAN GOULD AND MEMBERS BROWNING AND COHEN

On August 12, 1994, Administrative Law Judge Marvin Roth issued the attached decision. The Respondent filed exceptions and a supporting brief, and the General Counsel filed an answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions and to adopt the recommended Order as modified.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Avery Leasing, Inc., Marshall, Michigan, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Substitute the following for paragraph 1(a).

''(a) Discouraging membership in Local 7, International Brotherhood of Teamsters, AFL–CIO, or any other labor organization, by discriminatorily terminating employees or otherwise discriminating against them with regard to their hire or tenure of employment or any term or condition of employment.''

2. Substitute the attached notice for that of the administrative law judge.

[1] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT discourage membership in Local 7, International Brotherhood of Teamsters, AFL–CIO, or any other labor organization, by discriminatorily terminating employees or otherwise discriminating against them with regard to their hire or tenure of employment or any term or condition of employment.

WE WILL NOT interrogate you concerning your own or other employees' membership in, activities on behalf of, or attitude toward Local 7 or any other labor organization.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of your right to engage in union or concerted activities, or to refrain therefrom.

WE WILL offer William Beason immediate and full reinstatement to his former job or, if such job no longer exists, to a substantially equivalent position, without prejudice to his seniority or other rights and privileges previously enjoyed, and WE WILL make him whole for any losses he suffered by reason of the discrimination against him, with interest.

WE WILL remove from our files any reference to the termination of William Beason, and notify him in writing that this has been done and that evidence of this unlawful discharge will not be used as a basis for future personnel actions against him.

AVERY LEASING, INC.

Richard Czubaj, Esq., for the General Counsel.
Jeffrey L. Green, Esq., of Lansing, Michigan, for the Respondent.

DECISION

STATEMENT OF THE CASE

MARVIN ROTH, Administrative Law Judge. This case was heard at Marshall, Michigan, on May 26, 1994. The charge was filed on January 10, 1994, by Local 7, International Brotherhood of Teamsters, AFL–CIO (the Union). The complaint, which issued on February 24, 1994, alleges that Avery Leasing, Inc. (Company or Respondent) violated Section 8(a)(1) and (3) of the National Labor Relations Act (the Act). The gravamen of the complaint is that the Company allegedly engaged in coercive interrogation, and discharged employee William Beason, in retaliation for protected concerted discussions that he had with the Company and other employees, and in retaliation for his support for and activities on behalf of the Union. The Company's answer denies the commission of the alleged unfair labor practices. All parties were afforded full opportunity to participate, to present relevant evidence, to argue orally, and to file briefs. General Counsel and the Company each filed a brief.

Upon the entire record in this case,[1] and from my observation of the demeanor of the witnesses, and having considered the arguments of the parties, I make the following

[1] The official transcript of proceedings is noted and corrected.

FINDINGS OF FACT

I. THE BUSINESS OF THE COMPANY

The Company, a corporation with its principal office and place of business in Marshall, Michigan, is engaged in intrastate general freight hauling. In the operation of its business, the Company annually derives gross revenues in excess of $1 million, and annually provides services valued in excess of $50,000 to its customers located outside of Michigan. I find, as the Company admits, that it is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

II. THE LABOR ORGANIZATION INVOLVED

The Union is a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. *The Facts*

William Beason commenced working for the Company as a truckdriver in June 1992. Company Operations Safety Director David Price supervised the Company's drivers, including Beason.

In October 1993, truckdriver employees Beason and Jerry Mulkey commenced a union organizational campaign among the company employees.[2] Beason contacted Union Business Agent Robert Inman, who furnished authorization cards. Beason and Mulkey distributed the cards to other employees, usually at truckstops.

Beason asked driver Lance Lorenzen to sign a card, and Lorenzen did so. His signature is dated October 25. At the time Lorenzen signed the card, Lorenzen had given the Company notice of intention to quit. Lorenzen told Beason that he would be gone in a week and a half.

Lorenzen testified that he spoke to Operations Safety Director Price about 1 to 2 weeks after he signed the union card.[3] Lorenzen testified in sum as follows: He told Price that he was quitting because he wanted to spend more time at home. (The Company's drivers, principally engaged in long-distance beer hauling and delivery, spent most of their time on the road.) Lorenzen added that he was not comfortable with things that were going on and, specifically, that ''they were trying to get a union in.'' Price asked who was trying to do this, but Lorenzen declined to answer the question. He admitted to Price that he signed a union card.

In his investigatory affidavit, Price stated that at the time he discharged Beason on November 5, he ''was not aware of any specific effort by the drivers to get union cards signed or trying to get a union in at Avery Leasing.'' Price admitted in his testimony that this was not true. Price testified, in sum, that he had a conversation with Lorenzen substantially as described by Lorenzen.

In the fall of 1993, the Company was starting up a tanker truck operation through a related firm, Avery Transport. The operation involved local delivery and its drivers would not have to be away from home overnight. Price told the Company's employees that the Company probably would not transfer any of them to Avery Transport. However, within a week of their conversation, Price offered Lorenzen a transfer to Avery Transport, although Lorenzen had no experience driving tanker trucks. Lorenzen accepted the transfer. No other company drivers were transferred to Avery Transport.

Beason testified in sum as follows: On Thursday, November 4, Price notified him that the drivers on the Columbus, Ohio run, including Beason, would be laid off for the balance of the week because the Company's New York drivers were complaining that they did not have enough work. Price told Beason to pick up his paycheck the next day at the Company's facility. Beason reported to the facility, bringing his paperwork, but did not see any other drivers. Price summoned Beason to his office, and told Beason he was fired. Beason asked why, Price answered that Beason was ''always disrupting our meetings.'' Beason responded that this was not true, and that he spoke up only once, in connection with a meeting concerning insurance. Price then said that all Beason wanted to do was the Petitpren run. Beason replied that he did other runs. Beason asked to speak to Company Owner Myron Avery, but Avery refused to speak to Beason.

It is undisputed that when Price terminated Beason, he gave Beason a written ''termination report'' which stated that Beason was terminated for: ''Failer [sic] To Comply. Does Not Have Companies [sic] Interest. Bad Attitude.'' The report stated under additional comments: ''We Need Drivers That Are Versitile [sic] with No limitation, Not a [sic] Instigator.'' Beason testified in sum as follows: He asked what Price meant by failure to comply. Price answered: ''[W]ell, you know,'' and avoided giving a specific answer. Beason asked whether the instigator comment referred to Beason's union activities. Price smiled and responded: ''[U]nion, what union? We don't know anything about any union.'' Beason was not boisterous or loud.

Operations Safety Director Price testified in sum as follows with respect to the termination interview: He explained to Beason that he was terminated for: (1) failure to comply, in that he failed to present a written medical excuse in proper form for his need to take time off because of an alleged sore butt; (2) not having the Company's interest at heart, because he was constantly complaining; and (3) instigating the other drivers, because they were complaining about his bad attitude. After speaking with Beason a second time, Price inserted additional comments on his copy of the termination report, elaborating on his professed reasons for terminating Beason.

In his additional comments, Price wrote that: ''until Bill brought up this issue, I had no idea of any union activity.'' As indicated, this statement was false. In elaborating on the reasons for Beason's discharge, Price referred only to Beason's complaints to the Company and to other employees. Price wrote:

> Summary: ''Chronic bitcher + Always trying to cause problems with Co-workers'' . . . . For the last three months Bill has been on borderline termination. Whenever Avery's increased benefits Bill would always bitch. He was never satisfied. He would complain constantly to other drivers and they would complain to me

[2] All dates herein are for 1993, unless otherwise indicated.

[3] In his investigatory affidavit, Lorenzen stated that he spoke to Price in the first half of October. He testified that this was incorrect. In light of the date on his authorization card, and the subsequent sequence of events, it is evident that Lorenzen spoke to Price in late October or early November, shortly before Beason's discharge.

> about Bill's bad attitude and ask why we would keep a driver that had nothing good to say about our Company.

Nowhere in the termination report did Price refer either expressly or impliedly to alleged customer complaints about Beason. In the closing evaluation of Beason's performance report, Price indicated that his quality of work was good, attendance and job knowledge fair, and ''cooperation'' and ''initiative'' unsatisfactory.

Price testified that he discharged Beason, in sum, for three reasons: (1) failure to comply with certain procedures; (2) constant complaining by Beason, and complaints from other drivers about Beason's complaining; and (3) a complaint from the Company's best customer concerning Beason's performance. Price did not claim in his testimony that he discharged Beason for any other reasons.

Company Business Manager and Comptroller Debra Lanham also testified concerning the circumstances of Beason's termination. According to Lanham, she, Price, and Company Owner Avery made a collective decision to terminate Beason for four reasons: (1) the Company encountered increasing difficulty in dispatching Beason because he constantly complained about his assigned loads; (2) Beason apparently surreptitiously and improperly placed certain papers in his personnel file; (3) the papers indicated that Beason had physical problems of which the Company was not aware; and (4) the customer complaint, which was ''the icing on the cake.'' However, in her investigatory affidavit, Lanham gave a much different version of Beason's termination. Lanham stated that Price told her he was rerouting the drivers because he decided to let Beason go when things lightened up, the reason being that Price was ''tired of his whining.'' Lanham stated that about 10 days later she heard that Price discharged Beason. In light of Price's testimony that he made the decision to fire Beason, and Lanham's statements in her affidavit to the same effect, I find that Lanham was not involved in the decision to terminate Beason, and I attach no evidentiary weight to her explanation of the Company's reasons for terminating Beason.

Returning to Price's explanation of his reasons for terminating Beason, I shall initially address the third stated reason, the customer complaint, which Price described as ''the final straw.'' Price testified that a couple of days before he discharged Beason, he received a call from Timothy Anderson, who is reclamation supervisor for Petitpren, Inc. (Petitpren), a beer distributor in Mt. Clemens, Michigan. Petitpren is a major company customer. Anderson has frequent contact with company drivers and directs their work when they arrive at Petitpren's facility. Price testified that Anderson told him he should not send Beason back to Petitpren, and to ''get somebody else in there that could do the job.'' According to Price, Anderson complained that he could not get Beason to move trailers at the Petitpren facility, although company drivers were expected to do so when requested by Petitpren.

In his investigatory affidavit, Price gave a different version of his alleged conversation with Anderson. Price stated that in late October, Anderson telephoned him and, in a joking manner, questioned why Price was working Beason although Beason was ''walking around with a donut [a cushion].'' Price stated that at this point he decided to discharge Beason, ''because we did not want our drivers bothering our customers with these concerns.''

Beason testified in sum as follows: In August he began to have problems with his tailbone, and the problems were causing him pain. Anderson saw that he was suffering pain. He made fun of a foam cushion which Beason used in his truck, and asked why Beason had the cushion. Beason had no problems with Petitpren. He moved trailers and performed other tasks as requested by Petitpren. He did so as instructed by the Company because Petitpren was the Company's major customer, and the Company wanted to keep them happy.

By stipulation of the parties, General Counsel and the Company jointly presented the testimony of Timothy Anderson, through affidavit (Jt. Exh. 1) obtained jointly by their respective counsel. Anderson stated in sum as follows: On several occasions, Beason refused to move trailers within the Petitpren yard when requested to do so. Company drivers were expected to perform such services, and no other drivers refused to honor such requests. On at least two occasions, during the summer of 1993, Anderson informed Price of Beason's refusals. Anderson was angry, but he did not tell Price that he did not want Beason assigned to Petitpren (Anderson subsequently stated that he did not recall when he talked to Price, although it was warm then, and that he did not recall whether he told Price not to assign Beason to Petitpren). Anderson never saw Beason with a foam rubber cushion, and never discussed it with Price (Anderson subsequently stated that he did not recall whether he talked to Price about it). Beason was a whiner and complained a lot, but Anderson didn't care about this.

As indicated, Anderson equivocated somewhat in his affidavit. He evidently wished to maintain his neutrality, and to avoid unduly offending anyone. Perhaps he might have been pinned down on the witness stand. However, as an impartial witness, his testimony is entitled to special weight. Anderson's initial categorical statements are more reliable than his subsequent equivocation. Certain key facts emerge from his affidavit. Specifically, I find that in the summer of 1993, well before Beason's discharge, Anderson complained to Price about Beason's refusal to move trailers at the Petitpren yard. It is unlikely that anyone would characterize Michigan weather in late October or early November as ''warm outside.''

Therefore, it is evident that Anderson's complaints to Price were not ''the final straw'' which precipitated Beason's discharge. If Price considered Anderson's complaint to be as critical as he claimed, then it is probable that Price would have discharged Beason long before November 5. Rather, it is more likely that Price learned something else in late October or early November, which proved to be the catalyst for Beason's discharge. I have also taken into consideration Price's inconsistent statements concerning what Anderson told him and the fact that Price did not, either in Beason's termination interview or in his writeup of that interview, indicate that Anderson's complaints had anything to do with the discharge. As indicated, Price characterized Beason's quality of work as ''good.''

I shall next address Price's first stated reason for terminating Beason, namely, his alleged failure to comply with certain procedures. Price testified that this concerned Beason's refusal to sign a company-generated form, in connection with its workmen's compensation insurance coverage. As indi-

cated, Price testified that he told Beason the matter concerned Beason's failure to present a proper medical excuse for his absence.

The Company participated in a multiemployer self-insured workmen's compensation program. In connection with that program, Business Manager-Comptroller Lanham prepared a certification form, to be signed by each employee and cosigned by the Company. In signing the form, the employee certified, among other things, that the information contained in his or her job application, including physical health history, was complete and accurate, and that, unless noted, the employee was able to perform the duties for which the employee was hired. All of the Company's employees, except Beason, signed the form. Beason told Price that he would not sign the form without his attorney's opinion. Beason did not thereafter get back to the Company, nor did Price ever ask Beason whether he consulted his attorney.

The witnesses did not testify as to when the Company asked its employees to sign the form. However, Price testified that employee Mulkey signed his form on August 30. Therefore, it is evident that the Company presented the form to the employees on or before that date. It is evident that, as of November 5, Price had known for more than 2 months that Beason declined to sign the form.

With regard to the alleged failure to present a proper medical excuse, Price and Lanham testified in sum as follows: Beason was off work during the first week of October, ostensibly because of his tailbone problem. He said he might need to take off more time for medical testing. During the third week of October, Beason's wife gave Lanham a letter which purported to be a statement of his condition. However, the letter appeared to be roughly typed, was not on a doctor's stationery, and was not signed by a doctor. Neither Price nor Lanham testified that they required or requested Beason to furnish a medical excuse for his absence. Neither testified that, at any time prior to Beason's discharge, they told Beason that the letter was inadequate, or that he should furnish a medical excuse in proper form. Beason testified, without contradiction, that shortly before his discharge, he asked Price if he should see the company doctor about his tailbone condition, and Price answered that it would not be necessary. Lanham's testimony indicates that, in fact, Beason's wife presented the letter as a consequence of a conversation between Beason and Lanham as to whether his condition might be subject to workmen's compensation.

This leaves Price's second asserted reason for terminating Beason, namely, Beason's constant complaining and complaints from other drivers about Beason's complaining.

In fact, Beason had a reputation as a complainer throughout his whole employment with the Company. Most of these complaints concerned Beason's compensation, assigned runs, and other terms and conditions of employment. Operations Safety Director Price stated in his affidavit that: ''Ever since I had supervised Beason he had a history of complaining about working conditions.''

Price and Business Manager-Comptroller Lanham, both in their testimony and respective affidavits, attached particular significance to a complaint by Beason concerning an announced change in the Company's health insurance program. In late August, the Company conducted a meeting of employees. Price announced that the Company would drop dental coverage, and increase the deductible for prescriptions from $5 to $10. He indicated that the resulting savings would be used to provide the employees with life insurance and a 401(k) retirement program. After the meeting broke up, Beason complained to Lanham about the change. Beason testified that he told Lanham that he paid $38 per week for health insurance coverage and should have some say in the matter. Lanham assertedly responded that the Company paid 51 percent, and ''You'll get what we want to give you.'' Lanham testified that Beason said he had $300 per month in prescriptions, and the change would cost him $100 to $200 in additional expense. Beason testified that no one else was involved in this conversation. However, Lanham testified that Beason ''got everybody else's attention.''

With respect to complaints about Beason from other employees, Price testified that he received such complaints from several employees, including Eric Mullikin. Three present or former company employees (in addition to Beason) testified in this proceeding: Jerry Mulkey, Lance Lorenzen, and Eric Mullikin. Mulkey was the principal driver on the Petitpren run. He testified in sum as follows: He never complained about Beason complaining, and never heard any such complaints about him from other employees. Employees sometimes complained that Beason did not get his truck serviced or repaired, but employees commonly made such complaints about other employees.[4] Lorenzen testified that Beason complained and was hard to keep happy, but was ''a nice guy,'' and Lorenzen never complained to Price about him. Mullikin, who was presented as a company witness, testified in sum as follows: Beason complained a lot. He complained that Mullikin should not have been assigned a new truck because a driver with more seniority (not necessarily Beason) should have gotten the truck (Beason testified that he was third in seniority among the drivers). On one occasion, Mullikin told Price that he was sick of hearing Beason's complaints. Price advised Mullikin to ''just blow it off,'' and pay no attention to Beason. Beason testified that he was unaware that any driver other than Mullikin complained about him.

Considering the testimony of the employee witnesses, several salient factors emerge. Beason tended to complain, and the drivers were aware of, but generally not bothered about, the fact that he complained. Mullikin became concerned only because Beason made a complaint which potentially affected him, namely, that Mullikin should not have been assigned a new truck. However, that complaint was not of a personal nature. Beason was asserting that the Company should follow seniority in assignments, regardless of whether he personally benefited from a seniority practice. Mullikin's testimony further indicates that Price was not concerned about Beason's complaining. Price simply advised Mullikin to disregard it. Beason testified that on several occasions he and Price had ''heated conversations'' concerning his grievances, but until Price discharged Beason, he said nothing about Beason's attitude. In sum, Price had no problem in dealing with Beason's complaints, so long as Beason took no action to seek redress of his grievances.

[4] In early 1994, the Company discharged Mulkey. As indicated, Mulkey assisted Beason in the union organizing campaign. General Counsel does not contend that the Company discriminatorily terminated Mulkey. I have not considered his discharge in determining the merits of this case.

The Company adduced testimony concerning other asserted problems with Beason, although, as indicated, Price did not testify that these were reasons for his discharge. Price and Lanham testified, in sum, that they believed, but could not prove, that Beason or his wife surreptitiously and improperly placed certain papers in a section of his personnel file, which was maintained pursuant to Department of Transportation (DOT) regulations. They believed this was done during a period of 7 to 10 days when the Company was in the process of moving its facility and the office area was unlocked. The papers included a Michigan Rehabilitation Capabilities Reassessment, dated January 22, 1992, which indicated that Beason could not climb a ladder, and should avoid unprotected heights and ''marked temperature or humidity changes [cold].'' They believed that Beason or his wife inserted this document when Beason was asked to sign the company certification form previously discussed.

The Company was in the process of moving, and the office area was unlocked during this period of time in the summer of 1993. The company meeting concerning the change in health benefits also took place during this period. Price testified that he reviewed the personnel files on a monthly basis, and upon such review, found the papers, some of which (W-2 forms) plainly did not belong in the DOT section. It is evident that, regardless of who placed the papers in the file, Price knew of their existence well before November 4.

As indicated, Price did not testify that he terminated Beason either because he believed Beason placed the papers in the file or because the papers indicated that Beason could not perform his assigned work. Price's suggestion, in Beason's termination report, that the Company wanted only versatile drivers ''with No limitation,'' was plainly false. Beason stated on his job application, dated June 23, 1992, that he had a left-shoulder restriction. Beason also indicated that he attended a truckdriver training institute prior to applying for work with the Company. Beason testified, in sum, that he injured his shoulder while working at a prior (nondriving) job, and that at the training institute he was taught to climb a truck ladder by the ''three point method,'' without placing stress on his shoulder. Beason further testified, with respect to the documents allegedly wrongfully placed in his personnel file, that he gave those documents to the Company when he applied for employment. One of the documents consisted of a physical examination form, dated April 21, 1992, and signed by the examining doctor. The form indicated that Beason had a left-shoulder restriction, and a history of hypertension and diabetes, but was nevertheless qualified to be a truckdriver under DOT requirements. Beason testified, and the form indicated, that he was required to take this physical examination under DOT regulations. The Company did not present in evidence any ostensible reports on Beason's physical condition, other than those contained in the documents in question. I credit Beason. I find that the Company was fully aware of Beason's physical limitations when it hired him, and that Beason gave the Company the documents in question when he was hired.

In sum, the Company was well aware, long before November 5, of the facts pertaining to Beason's alleged deficiencies, including those variously asserted by the Company as grounds for his discharge. The only new thing the Company learned, or could have learned in late October or early November, was that Beason was the key person in the union organizational campaign.

B. *Concluding Findings*

I find that the Company, and specifically Price, violated Section 8(a)(1) of the Act by questioning employee Lorenzen as to the identity of employees who were trying to bring in a union. Although Lorenzen voluntarily told Price that there was union organizational activity, Price had no legitimate reason to pursue the matter by questioning Lorenzen concerning the union activities of other employees. It is significant that within a short time following this conversation, Price summarily discharged Beason, and gave Lorenzen a desirable transfer, contrary to declared company policy.

I further find that the Company violated Section 8(a)(1) and (3) by discharging Beason because of his key role in the union organizational campaign, and to discourage other employees from engaging in such activity.

First, as discussed above, the reasons advanced by the Company for discharging Beason were contradictory, and demonstrably false or pretextural. In part, as will be further discussed, they were also addressed to Beason's protected concerted activity. Second, the evidence indicates that Price determined to learn the identity of the leading union adherent or adherents, if necessary, through unlawful interrogation. The evidence further indicates that Price, without advance warning, discharged Beason within a short time after learning of the union organizational campaign.

I also find significant Price's description of Beason, in the termination report, as an instigator. Price and Lanham, in their testimony, described Beason as a whiner and chronic complainer. Price asserted that other employees complained to management about Beason's complaining, and that these concerns were motivating factors in Beason's discharge. If so, then ''instigator'' would be a strange choice of word to describe Beason. An instigator is one who goads or urges others forward, or provokes or incites them to some action or course. If, as suggested by Price, the employees were annoyed by Beason's complaining, then Beason would not qualify as an instigator. Rather, in the context of events, Price's choice of that word tends to indicate that the Company bore animus against Beason because he was inciting the employees to join the Union, or to protest their terms and conditions of employment. Either activity would constitute activity protected under the Act.[5]

[5] The Company argues (R. Br. p. 12) that, apart from Beason's union activity, General Counsel failed to prove that Beason engaged in protected concerted activity because Beason's complaints pertained only to himself. The evidence indicates otherwise. As discussed, employee Mullikin complained to Price because Beason sought to invoke a seniority system, regardless of whether he personally benefited. Business Manager-Comptroller Lanham testified that when Beason complained to her about reduction of health care benefits he ''got everybody else's attention.'' Where an employee, in the presence of other employees, complains to management concerning wages, hours, or other terms and conditions of employment, such complaints constitute protected concerted activity, even though the employee purports to speak on behalf of himself or herself. *Gold Coast Restaurant v. NLRB*, 995 F.2d 257, 264 (D.C. Cir. 1993); see also *NLRB v. Sencore, Inc.*, 558 F.2d 433 (8th Cir. 1977); *Jeannette Corp.*, 217 NLRB 653, 657 (1975), enfd. 532 F.2d 917 (3d Cir. 1976). Moreover, Price's designation of Beason as an instigator indicates that the Company believed Beason was inciting the employees

For the foregoing reasons, General Counsel presented a prima facie case that the Company discharged Beason because of his union activity, and specifically, that the Company learned of Beason's leading role in the organizational campaign and was motivated by animus toward Beason because of such activity. It is a settled principle of law that knowledge of union activity and animus, like other elements of an unfair labor practice case, may be found from circumstantial evidence, if the circumstances are such as to support a reasonable inference. *NLRB v. Radcliffe*, 211 F.2d 309, 315 (9th Cir. 1954), cert. denied 348 U.S. 833 (1954); see also *Walker v. City of Birmingham*, 388 U.S. 307, 312 fn. 4 (1967). Knowledge and animus may be inferred when the employer, as here, advances false or pretextural reasons for the discharge. *Whitesville Mill Service Co*., 307 NLRB 937 (1992). Knowledge or animus may also be inferred from an otherwise unexplainable remark (here, the assertion that Beason was an instigator). See *West Meat Co*., 244 NLRB 828, 830, 832 (1979). As the Company's professed and contradictory reasons for terminating Beason were false or pretextural, and in part legally untenable because they were addressed to protected concerted activity, it follows that the Company failed to meet its burden of establishing that it would have terminated Beason in the absence of his union and concerted activity.

CONCLUSIONS OF LAW

1. The Company is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. By interfering with, restraining, and coercing its employees in the exercise of the rights guaranteed them by Section 7 of the Act, the Company has engaged in, and is engaging in, unfair labor practices within the meaning of Section 8(a)(1) of the Act.

4. By discriminatorily discharging William Beason, thereby discouraging membership in the Union, the Company has engaged in, and is engaging in, unfair labor practices within the meaning of Section 8(a)(3) of the Act.

5. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

THE REMEDY

Having found that the Company has committed violations of Section 8(a)(1) and (3) of the Act, I shall recommend that it be required to cease and desist therefrom, and to take certain affirmative action designed to effectuate the policies of the Act.

Having found that the Company discriminatorily terminated William Beason, it will be recommended that the Company be ordered to offer him immediate and full reinstatement to his former job or, if such job no longer exists, to a substantially equivalent position, without prejudice to his seniority or other rights and privileges, and make him whole for any loss of earnings and benefits that he may have suffered from the time of his termination to the date of the Company's offer of reinstatement. I shall further recommend that the Company be ordered to remove from its records any reference to the unlawful termination of Beason, to inform Beason in writing of such expunction, and to inform him that its unlawful conduct will not be used as a basis for further personnel actions against him. Backpay shall be computed in accordance with the formula approved in *F. W. Woolworth Co*., 90 NLRB 289 (1950), with interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).[6] The Company shall be required to preserve and make available to the Board or its agents, on request, payroll and other records to facilitate the computation of backpay due.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[7]

ORDER

The Respondent, Avery Leasing, Inc., Marshall, Michigan, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Discouraging membership in Local 7, International Brotherhood of Teamsters, AFL–CIO, or any other labor organization, by discriminatorily terminating employees, or in an other manner discriminating against them with regard to their tenure or employment or any term or condition of employment.

(b) Interrogating employees concerning their own or other employees' membership in, activities on behalf of, or attitude toward said union or any other labor organization.

(c) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Offer William Beason immediate and full reinstatement to his former job or, if such job no longer exists, to a substantially equivalent position, without prejudice to his seniority or other rights and privileges previously enjoyed, and make him whole for any loss of earnings and other benefits suffered as a result of the discrimination against him, in the manner set forth in the remedy section of this decision.

(b) Remove from its files any reference to the termination of William Beason, and notify him in writing that this has been done and that evidence of this unlawful discharge will not be used as a basis for future personnel actions against him.

(c) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due.

(d) Post at its Marshall, Michigan office and place of business, copies of the attached notice marked ''Appendix.''[8]

to assert their grievances. See *United States Service Industries*, 314 NLRB 30 (1994).

[6] Under *New Horizons*, interest on and after January 1, 1987, is computed at the ''short-term Federal rate'' for the underpayment of taxes as set out in the 1986 amendment to 26 U.S.C. § 6621.

[7] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[8] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading ''Posted by Order of the

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Copies of the notice, on forms provided by the Regional Director for Region 7, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(e) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

National Labor Relations Board'' shall read ''Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.''